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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-222

PAUL GILBERT, ALLRED AUBREY L. DAVIS, JR., and IRIS BLUE LEWIS,

Petitioners,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

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ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

****

The petitioners, Paul Gilbert Allred, Aubrey L. Davis, Jr., and Iris Blue Lewis, pray that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals, entered April 17, 1974, affirming petitioners' conviction by the Superior Court of New Hanover County, which judgment the Supreme Court of North Carolina refused to review by its judgment entered June 4, 1974, dismissing petitioners' appeal and denying their petition for writ of certiorari.

OPINION BELOW

The opinion of the Court of Appeals of North Carolina and the judgment of the Supreme Court of North Carolina have not yet been reported. Both the opinion and the judgment are appended to this petition.

JURISDICTION

The judgments of the Superior Court of New Hanover County convicting petitioners Paul Gilbert Allred, Aubrey L. Davis, Jr., and Iris Blue Lewis of the crime of violation of the emergency proclamation in violation of North Carolina General Statute 14-288.12 and sentencing each of them to serve a term of thirty (30) days in the New Hanover County Jail, suspended for two years upon the payment of a fine of $25.00 were entered on August 17, 1972. Petitioners' relief in the North Carolina courts was exhausted when their conviction was affirmed by the North Carolina Court of Appeals on April 17, 1974, and when the Supreme Court of North Carolina on June 4, 1974, dismissed their appeal and denied their petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C.A. sec. 1257(3).

QUESTIONS PRESENTED

I. Were the petitioners' rights under the First and Fourteenth Amend-

ments of the Constitution of the United States violated by the issuance of an emergency proclamation when that proclamation was issued without any notice or hearing for petitioners and the officers and members of the organization known as Rights of White People, against which persons the proclamation was directed; and when there was no clear and present danger existing, either at the time of the issuance of the proclamation, or at the time of the arrest of petitioners, which would justify interfering with petitioners' freedom of expression and assembly?

II. Were the petitioners' basic rights under the First and Fourteenth Amendments to the United States Constitution violated by the refusal of the trial judge to allow counsel for petitioners to present evidence relevant to petitioners' state of mind or to argue that in a case where First Amendment freedoms are at stake, the State must prove that petitioners' behavior was willful and motivated by criminal intent or state of mind?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment I.

Congress shall make no law respecting an establishment

of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

N.C.G.S. 14-288.12

(a) The governing body of any municipality may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of

emergency.

(b) The ordinances authorized by this section may permit prohibitions and restrictions:

(1) Of movements of people in public places;

(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate;

(3) Upon the possession, transportation, sale, purchase, and consumption of intoxicating liquors;

(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline; and

(5) Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

The ordinances may delegate to the mayor of the municipality the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) This section is intended to supplement and confirm the powers conferred by §§ 160-52, 160-200(7), and all other general and local laws authorizing municipalities to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency.

(d) Any ordinance of a type authorized by this section promulgated prior to June 19, 1969 shall, if otherwise valid, continue in full force and effect without reenactment.

(e) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a misdemeanor punishable as provided in § 14-4. (1969)

ARGUMENT

1. The petitioners' rights under the First and Fourteenth Amendments of the Constitution of the United States were violated by the issuance of an emergency proclamation when that proclamation was issued without any notice or hearing for petitioners and the officers and members of the organ-

ization known as Rights of White People, against which persons the proclamation was directed; and when there was no clear and present danger existing, either at the time of the issuance of the proclamation, or at the time of the arrest of petitioners, which would justify interfering with petitioners' freedom of expression and assembly.

The petitioners base their challenge to the constitutionality, as applied to them, of Section 14-288.12 of the North Carolina General Statutes, which authorizes the issuance of an emergency proclamation, on two theories. First, their right to due process of law was violated when the emergency proclamation was issued ex parte, with no notice or opportunity for hearing given to the group at which the proclamation was aimed. Second, no clear and present danger existed which would justify interfering with the petitioners' freedom of expression and assembly.

The emergency proclamation was issued on the afternoon of November 12, 1971, to go into effect at 7:00 p.m. that evening. It was issued by Mr. Meares Harriss, Chairman of the New Hanover County Board of County Commissioners. Mr. Harriss testified at petitioners' trial that the purpose of the proclamation was to prevent the holding of public meetings by a group known as Rights of White People, of which petitioners are members.

Although Mr. Harriss was personally acquainted with some of the leaders of ROWP (R at p. 16), he made no effort to contact any of these people to give them notice that the issuance of an emergency proclamation was being discussed. (R at p. 16) Rather, Mr. Harriss met only with the Sheriff, one of the solicitors, the Chief of Police, and several other police and sheriff officials to hear a tape recording of a speech made at a ROWP meeting held the previous evening. (R at p. 12) At this meeting, with no members or leaders of ROWP in attendance, it was decided that a state of emergency should be declared in New Hanover County, and that a proclamation should be issued.

This Court has spoken out forcefully against such prior restraints, especially when issued ex parte, upon First Amendment freedoms. In Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 21 L.Ed.2d 325, 89 S.Ct. 347 (1968), a temporary restraining order was issued ex parte to stop a public meeting. In the Carroll case, as here, no effort was made to contact the persons involved in the meeting that was felt to be disruptive to the public peace and harmony. The Court said:

> "There is a place in our jurisdiction for ex parte issuance without notice of temporary restraining orders of short duration, but there is no place within the area of basic freedoms guaranteed by

> the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.
>
> --Id. at 180.

This is a frequently cited principle of constitutional law. In Lynch v. Snepp, 350 F.Supp. 1134 (W.D.N.C. 1972), the administrators of the public schools in Charlotte, North Carolina, obtained an injunction, ex parte, from defendant Judge Snepp against John Doe, Richard Roe, and all others of like situation, forbidding, among other things, these persons from going on school property without the prior permission of the administrators. Quoting from the Court's opinion in Carroll v. Princess Anne, supra, the Court said:

> "The Court has emphasized that '[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' Bantam Books v. Sullivan, 372 U.S. 58, 70 [83 S.Ct. 631, 639, 9 L.Ed.2d 584](1964); Freedman v. Maryland, 380 U.S. 51, 57 [85 S.Ct. 734, 738, 13 L.Ed.2d 649](1965). And even where this presumption might otherwise be overcome, the Court

> upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in Freedman v. Maryland, supra, at 58 [85 S. Ct. at 739], a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" (Emphasis the District Court's.)
>
> --Lynch v. Snepp, 350 F.Supp. 1134, 1141-1142 (W.D.N.C. 1972)

In Anderson v. Dean, 354 F.Supp. 639 (N.C.Ga. 1973), a restraining order was issued ex parte against the mailing of letters by petitioner Anderson which were critical of Anderson's previous employer. The Court called this an unconstitutional prior restraint on Anderson's First Amendment liberties.

In Organization for a Better Austin v. Keefe, 402 U.S. 415, 29 L.Ed. 2d 1, 91 S.Ct. 1575 (1971), the defendants were engaged in the distribution of leaflets in the neighborhood of plaintiff, a real estate broker, accusing plaintiff of engaging in blockbusting and other "panic peddling" activities.

Plaintiff sought and obtained an injunction against defendants' activities. The Supreme Court held that that injunction, based on previous publications, was an unconstitutional prior restraint on defendants' First Amendment rights, stating, "Any prior restraint on expression comes to this Court with a heavy presumption against its validity." Id. at 419.

It can hardly be claimed that Mr. Harriss found it impossible to serve or notify the members of ROWP and to give them an opportunity to participate in the meeting at which it was decided that an emergency proclamation must issue. Mr. Harriss claimed at the trial that time was short. (R at p. 16) However, there was time to summon the Sheriff, the Chief of Police, a solicitor and several deputies to the meeting. Why was there not time to summon the leaders of ROWP, with whom Mr. Harriss testified he was personally acquainted?

What makes this encroachment upon First Amendment rights even more serious is the fact that no clear and present danger to the public safety existed either at the time of the issuance of the proclamation or at the time of the defendants' arrest. The right of citizens to assemble peacefully in public places and discuss issues of national importance is among the most closely guarded of all democratic rights. It can be abridged only by showing that to

allow the exercise of the right would constitute a clear and present danger to the public at large.

> "Wherever the title of streets and parks may rest, they have been immemoriably held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.
>
> --Hague v. Committee for Industrial Organization, 307 U.S. 496, 515-516, 83 L.Ed. 1423, 59 S.Ct. 954 (1939).

Clearly, then, in order to validate such a sweeping prior restraint upon freedom of speech as the cancellation of all public meetings between the hours

of 7:00 p.m. and 7:00 a.m., it must be shown that a clear and present danger to the public safety existed. It is admitted that the City of Wilmington and New Hanover County had been the scene of racial strife for some time. It is understandable that public officials might have feared a violent confrontation. This fear alone, however, does not justify placing a tight lid upon freedom of expression. "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. . . ." Tinker v. Des Moines Independent Community School, 393 U.S. 503, 508, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969). There is nothing in the record to indicate that the holding of ROWP rallies in Hugh McRae Park might reasonably have been expected to bring about that confrontation. While the tape recorded speech which inspired the issuance of the emergency proclamation was rife with racial slurs and threats, no showing was made at petitioners' trial that the speech inspired any specific acts of violence. Police officers who attended ROWP meetings as observers testified that substantially similar speeches had been made on many previous occasions. But while the record indicates that there were occasions upon which armed members of ROWP congregated, it does not indicate that these incidents culminated in violent confrontation. In fact, the record indicates that ROWP members went out of their way to

be of assistance to law enforcement officials in times of racial tension. There is simply nothing in the record to indicate that members of ROWP were moved to violent actions by the oft-repeated exhortations by speakers at their rallies that they should be ever armed and on the alert. It is the petitioners' contention that what had not occurred in the past could not reasonably have been expected to occur in the future. Although it cannot be denied that the speakers at ROWP rallies aroused the passions of their audience and of the community at large, this is not sufficient motivation for broadly applied prior restraints on First Amendment liberties. "A function of free speech under our system of government is to invite dispute . . . that is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of a substantive evil that rises far above public inconvenience, annoyance or unrest." Terminiello v. Chicago, 337 U.S. 1, 4, 93 L.Ed. 1131, 69 S.Ct. 894 (1948).

The petitioners do not contend that G.S. 14-288.12 is unconstitutional on its face. Rather their position is that its application to them, ex parte, and without clear and present danger to public safety, is unconstitutional. Two cases interpreting the statute and declaring it constitutional arise out of conditions of unrest and violence in Asheville, North Carolina. Those two cases can, however, be distinguished

on their facts from the case at bar.

In State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971), the trial judge held a voir dire hearing on defendant's motion to quash the warrants against him on the grounds that no actual emergency existed. Among other facts, the trial judge found the following: A violent confrontation occurred at Asheville High School between police and students, resulting in extensive personal injuries to both students and police officers. There was also extensive destruction of school property, the overturning of an automobile on school property and rock throwing. Threats to burn the city were made at public meetings by both students and adult citizens of Asheville. It was necessary to close Asheville High School and other city schools. There was a general air of violence in the city, with rocks thrown at police and non-police vehicles on the city streets, and widespread infliction of property damage and personal injuries.

Certainly this state of affairs was far more dangerous than that in New Hanover County when Mr. Harriss proclaimed a state of emergency. While widespread physical violence had occurred in Asheville, the major problem in New Hanover County was inflammatory speech-making.

In upholding the declaration of an emergency in Asheville, the United States Court of Appeals for the Fourth Circuit said:

> "A curfew, like ordinances restricting loudspeaker noises and limiting parade permits, doubtless has an incidental effect on First Amendment rights. The standard that has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction on First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected. . . . The limitation on the use of powers by the executive is essentially the same. The declaration of a state of emergency and the restrictions imposed pursuant to it must appear to have been reasonably necessary for the preservation of order."
>
> --U.S. v. Chalk, 441 F.2d 1277, 1280-1281 (4th Cir. 1971).

It seems clear, then, that there is involved here a substantial question of whether or not the exercise of the powers granted in G.S. 14-288.12 was constitutional in the case at bar. The cases cited above are unanimous on the point that before encumbrances may be placed on First Amendment freedoms, there must be a clear and present danger of public harm. Whether or not those conditions in fact existed is a

question of fact for the jury. At petitioners' trial, however, the judge instructed the jury that the emergency proclamation was constitutional and valid as a matter of law, and refused to give the instructions requested by the petitioners to the effect that a clear and present danger must exist before limitations may be placed upon freedom of expression and assembly.

In our judicial system, the province of the jury is clearly separated from the province of the judge; the jury determines questions of fact, the judge, questions of law. State v. Lawrence, 146 S.E. 395, 196 N.C. 562 (1929); State v. Fogleman, 168 S.E. 536, 204 N.C. 401 (1933); State v. De Graffenreid, 27 S.E.2d 130, 223 N.C. 461 (1943); State v. Squires, 158 S.E.2d 345, 272 N.C. 402 (1968).

Substantial amounts of testimony appear in the record upon which the jury might have based its determinations of such factual questions as the existence of a clear and present danger of harm to the community, and whether or not the Chairman of the Board of County Commissioners had an opportunity to give notice to the leaders of Rights of White People before declaring a state of emergency that barred them from holding public meetings. The court could have then instructed the jury on the applicable principles of constitutional law.

In charging the jury that the proclamation by the Chairman of the

Board of County Commissioners was valid and constitutional and declining to give the instructions requested by the defendants, the court invaded the province of the jury and committed prejudicial and reversible error.

2. The petitioners' basic rights under the First and Fourteenth Amendments to the United States Constitution were violated by the refusal of the trial judge to allow counsel for petitioners to present evidence relevant to petitioners' state of mind or to argue that in a case where First Amendment freedoms are at stake, the State must prove that petitioners' behavior was willful and motivated by criminal intent or state of mind.

Throughout the petitioners' Superior Court trial, the judge excluded all testimony and argument bearing on the issue of the petitioners' state of mind at the time of their arrest. The petitioners contend that where, as here, First Amendment freedoms are at issue, the State must show criminal intent as an element of the crime. This is especially true where, as in this case, the warrants on which petitioners were charged stated that they "willfully" violated the criminal statute in question.

A useful analogy may be drawn to New York Times Co. v. Sullivan, 276 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964).

In that case, a group of civil rights workers from Alabama ran a paid political advertisement in the New York Times describing the conditions of racial conflict at the Alabama State College campus in Montgomery, Alabama. Among other things, the advertisement charged the Montgomery police with repressive treatment of Negro students and civil rights activists. The respondent, L. B. Sullivan, complained that he had been libeled by the advertisement because, as one of the three elected commissioners, he was responsible for supervision of the Montgomery police. Therefore, any charge of bad police conduct reflected on him.

Sullivan's position was that the statements made in the advertisement were untrue, that the New York Times Company was negligent in not checking their available back files of news stories to ascertain the truth of the statements and, therefore, that the New York Times was guilty of libel.

The United States Supreme Court held that ". . . the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Id., at 283. The Court reasoned that actual malice must be shown before a newspaper is guilty of libel for publishing false statements regarding public officials. To require those making or printing such statements to prove the truth of the

statements might prevent them from speaking out at all; might limit public debate. "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id., at 279, 280.

Analogizing to the case at bar, it seems that the position urged by respondent Sullivan is parallel to that maintained by the trial court in the instant case. A showing that the New York Times intended to publish a false statement is similar to a showing that these petitioners and other members of the organization Rights of White People intended to be present in Hugh MacRae Park while the purported emergency proclamation was in effect.

The petitioners contend that in order to meet the requirement enunciated in New York Times Co. v. Sullivan, supra, the State should be required to prove that the petitioners intended to do some act which would violate the spirit of the emergency proclamation; intended to behave in a fashion so violent and disorderly that the peace of the community would in fact be interrupted.

In reaching its decision in New York Times Co. v. Sullivan, supra, the United States Supreme Court relied on a case in

which it had enunciated similar principles in a criminal law context. In Smith v. California, 361 U.S. 147, 4 L. Ed.2d 205, 80 S.Ct. 215 (1959), the Supreme Court held that guilty knowledge was indispensable to a valid conviction of a bookseller for possessing obscene writings for sale.

> "For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him, the public's access to reading matter would be restricted . . . [H]is timidity in the face of his absolute criminal liability thus would tend to restrict the public's access to forms of the word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would

be impeded."

-- Id. at 153-154.

This Court has required specific knowledge and intent in yet another area of the law related to First Amendment freedoms. In Wieman v. Updegraff, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952), this Court considered the question of whether loyalty oaths could be applied against persons who did not know that the organizations to which they belonged were subversive.

> "We are thus brought to the questions touched on in Garner, Adler and Gerende: whether the due process clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before us, the fact of membership alone disqualifies."

--Id. at 190.

In Wieman, the Court decided that constitutional guarantees did require definite knowledge on the part of members of organizations that they were participating in subversive behavior.

The United States Supreme Court has applied similar principles in formulating

a definition for the word "willfully" and that word appears in the criminal law relating to taxation, a definition which petitioners contend could be usefully applied in this case. In United States v. Bishop, 412 U.S. 346, 36 L.Ed.2d 941, 93 S.Ct. 2008 (1973), the question before the Court was whether the word "willfully" means the same thing in tax misdemeanors as it does in tax felonies. The Court formulated a definition for the term to be applied in tax felonies in United States v. Murdock, 290 U.S. 389, 78 L.Ed. 381 (1933). There it was held that willfully implies "bad faith or evil intent." Id. at 398. In Bishop it was held that that definition applies equally in misdemeanor cases.

In all of the types of cases discussed above where willfulness was part of the offense the state was required to prove some specific bad intent as an element of the crime. It is important to note that the petitioners are not asking this Court to hold that a person who indulges in specific behavior to test the constitutionality of a law should always be deemed innocent when criminal charges are brought. The petitioners merely contend that where First Amendment freedoms are at stake, the State must prove, as an element of the offense, specific bad intent on the part of the defendants.

CONCLUSION

For the reasons stated above, it is

respectfully submitted that this petition for writ of certiorari should be granted.

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No. 735SC197 FIFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

v. From New Hanover

PAUL GILBERT ALLRED, AUBREY L. DAVIS, JR., and IRIS BLUE LEWIS

Appeal by defendants from Clark, Judge, 7 August 1972 Criminal Session of Superior Court held in New Hanover County.

Each of the three defendants was charged by warrant with willfully violating provisions of a proclamation issued by the Chairman of the Board of County Commissioners of New Hanover County which declared a state of emergency to exist within said county, such offense being a misdemeanor under G.S. 14-288.13(d). After convictions in the District Court, defendants appealed to the Superior Court where they pled not guilty and were tried de novo, the three cases being consolidated for trial. The State's evidence showed:

At a meeting held on 5 February 1971 the Board of County Commissioners of New Hanover County enacted an ordinance permitting imposition of certain prohibitions and restrictions during a state of emergency, being the same

prohibitions and restrictions as enumerated in G.S. 14-288.12(b), and delegating to the Chairman of the Board the authority to determine and proclaim the existence of a state of emergency and during such state of emergency to impose authorized prohibitions and restrictions. Following a period of public turmoil in New Hanover County in the fall of 1971, Meares Harriss, Jr., the Chairman of the Board of County Commissioners of New Hanover County, at 6:30 p.m. on 12 November 1971 issued a proclamation proclaiming that a state of emergency existed within New Hanover County and forbade, among other things, "the use of any public park in New Hanover County between the hours of 7:00 p.m. and 7:00 a.m." This proclamation was issued after Chairman Harriss had met at police headquarters with the Chief of Police, the Sheriff, the Mayor, and other officials, and after he heard a tape recording of a speech which had been made on the preceding evening by LeRoy Gibson, head of an organization known as Rights of White People (ROWP) at a meeting sponsored by ROWP at Hugh MacRae Park, a public park in New Hanover County located outside but near the City of Wilmington. Copies of the proclamation were given to the news media, and at approximately 6:40 p.m. on 12 November 1971 an officer of the New Hanover County Sheriff's Department went to the Hugh MacRae Park, where another meeting sponsored by ROWP was in progress. The officer read the

proclamation to the crowd of approximately 100 people assembled at the meeting, and those present then left the park. Two days later, on Sunday, 14 November 1971, a crowd again gathered at Hugh MacRae Park. At about 6:40 p.m. the officer again went to the park and several times read the proclamation over a bullhorn, each time stating that if those present did not leave the park they would be arrested. The three defendants were among those present in the park. When they refused to leave at 7:00 p.m., they were arrested.

At the close of the State's evidence, defendants moved for nonsuit, whereupon the trial judge entered the following order:

> "Upon the conclusion of the State's evidence all defendants having made motions for judgment of nonsuit, and the undersigned Judge Presiding having determined that there had not been heretofore in these causes a finding of facts and determination of the validity of the proclamation, dated 12 November, 1971, which the defendants are charged with violating, though motions to quash have been previously denied, and after admitting and accepting evidence beyond the scope of jury trial for the purpose of making such determina-

tion, the Court finds the following facts:

"During the Fall of 1971, which continued unabated until 12 November of that year, there was turmoil and strife, including burnings, assaults, sniping, and looting in the City of Wilmington, and in some isolated instances in areas near but outside the city such as Flemington and Green Meadows.

"Hugh MacRae Park was a public park of New Hanover county, adjoining the limits of the City of Wilmington, consisting of a wooded area, playgrounds, and athletic fields, and with a cleared picnic area located approximately in its center.

"The Rights of White People Association, commonly referred to as 'ROWP' had a chapter in New Hanover County, with membership residing in the county, said chapter being headed by the defendant Paul G. Allred, and said Association being headed by LeRoy Gibson of Onslow County.

"Several weeks prior to 12 November, 1971, the local chapter held private and public meetings, most of the

public meetings being held in the picnic area of Hugh MacRae Park.

"LeRoy Gibson made several speeches prior to 11 November, 1971, and advocated and encouraged, among other things, that the audience bring guns and that he would send them so armed on patrols in the city for the purpose of stopping the race war by force. Prior to this date ROWP had sent out armed partrols in the city. A ROWP mob with guns had marched to the home of a public school officer, and at another time to the home of a plant foreman who had fired a ROWP member. Armed members of ROWP stopped persons going through MacRae Park while meetings were being held in the picnic area.

"A public meeting of ROWP was held in the picnic area of Hugh MacRae Park on the night of 11 November, 1971, and the speech of LeRoy Gibson was recorded on tape by Deputy Sheriff Larry Hayes, and later transcribed and received in evidence. In said speech Gibson advocated and requested that those present bring guns and ammunition to the next meeting in the park at 7:00 p.m. on 12

November, 1971, after which he would send them on armed patrol.

"A meeting was called and held at about 5:00 p.m. on 12 November, 1971, when Meares Harriss, Chairman, New Hanover Board of Commissioners, the county sheriff, the mayor of the city, chief of police of the city, and other officers were present. Those present were concerned and feared that in view of the conditions of strife and turmoil such a meeting of ROWP, to which the public was invited, and to which it was urged that attending people bring guns and ammunition, for the purpose of armed patrol, would result in a confrontation between such militant whites and militant blacks which could and probably would spread and balloon into a race riot in the city and county of such proportions that public order could not be maintained.

"Thereupon Chairman Harriss at about 6:30 p.m., signed the proclamation prohibiting use of county parks by the public between the hours of 7:00 p.m. and 7:00 a.m., (Exhibit 2), an ordinance under the Omnibus Riot and Civil Disorder Act having been enacted on 5 February 1971.

"Deputy Hayes was immediately dispatched to the park with the ordinance, and he arrived there about 6:40 p.m., and read it to the approximately 100 people assembled there for the ROWP meeting.

"Copies of the proclamation were delivered to all communication media in the city and county.

"And the Court concludes the following:

"That Chairman Harriss on the basis of personal knowledge and reliable information had reasonable grounds to believe and did believe that a state of emergency, as defined by said Riot Act, existed or was imminent, and his issuance of the proclamation was not arbitrary and was not capricious, and was fully justified under the existing conditions; that the proclamation was lawful and valid; that the State has offered competent evidence tending to show a violation of the proclamation by the defendants as charged.

"Therefore, the motions for judgment of nonsuit by each of the defendants are denied.

"/s/ Edward B. Clark
"Judge Presiding"

Each of the defendants testified that at the time they were arrested in Hugh MacRae Park after 7:00 p.m. on 14 November 1971 they knew of the proclamation forbidding the use of the park between the hours of 7:00 p.m. and 7:00 a.m., and that they deliberately remained in the park because they felt that no state of emergency in fact existed and that their First Amendment Constitutional rights were being denied.

The court instructed the jury that if "you the jury should find beyond a reasonable doubt the facts to be as all of the evidence tends to show, then it would be your duty to return a verdict of guilty as to each defendant, but if the jury is not so satisfied, it would be your duty to return a verdict of not guilty."

The jury found each of the three defendants guilty as charged. Judgments were imposed sentencing each defendant to prison for 30 days, suspended on condition each defendant pay a fine of $25.00 and costs. Defendants appealed.

Attorney General Robert Morgan by Assistant Attorney General Henry T. Rosser for the State.

Smith, Patterson, Follin & Curtis by Norman B. Smith for defendant appellants.

PARKER, Judge. Prior to arraignment for trial de novo in the Superior Court, defendants appeared through counsel before Judge Winifred T. Wells, presiding at the 17 July 1972 Criminal Session of Superior Court in New Hanover County, and moved to quash the warrant in each case on the grounds (1) the proclamation declaring the state of emergency referred to G.S. 160-20.2, which provided for cooperation between law enforcement officers of different political subdivisions in event of a declared emergency, and made no reference to G.S. 14-288.12 (sic); (2) the proclamation was issued without any notice and hearing for defendants; and (3) there was no clear and present danger existing, either when the proclamation was issued or when defendants were arrested, which would justify interfering with their freedom of expression and assembly. The motions to quash were denied, which action is the subject of appellants' first assignment of error. There was no error in denial of the motions to quash.

"In this jurisdiction the rule is well established that a warrant may be quashed only for its failure to charge a crime or a lack of jurisdiction of the court to try the case -- defects which appear on the face of the record. In ruling upon a motion to quash the judge rules only upon a question of law. He is not permitted to consider 'extraneous evidence,' that is,

the testimony of witnesses or documents other than the specific statutes or ordinances involved." State v. Underwood, 283 N.C. 154, 195 S.E. 2d 489. In the present cases the warrants charged defendants with willful failure to comply with the proclamation issued by the Chairman of the Board of County Commissioners by using Hugh MacRae Park between the hours of 7:00 p.m. and 7:00 a.m. on 14 November 1971. Use of the park at that time was specifically prohibited by the proclamation. Issuance of the proclamation was authorized by the ordinance, which in turn was authorized by G.S. 14-288.13, by which a portion of the State's police power was delegated to the governing bodies of the counties of this State. A similar delegation of police power to the governing bodies of municipalities, made by G.S. 14-288.12, was held constitutional in State v. Dobbins, 277 N.C. 484, 178 S.E. 2d 449. That the proclamation made no reference to the statute in no way affected its validity; the existence of the statute, not reference to it in the proclamation, was all that mattered. Thus, the face of the warrants charged defendants with committing an act which by G.S. 14-288.13(d) is made a misdemeanor. No defect appears on the face of the record, and defendants' motions to quash the warrants were properly denied by Judge Wells.

Upon trial of these cases before Judge Edward B. Clark and a jury, Judge

Clark ruled as a matter of law that the proclamation was valid and constitutional, and accordingly instructed the jury that the only question before the jury was whether the defendants had violated the proclamation. In this we find no error. The limited delegation of the State's police power which our Legislature deemed wise to grant by G.S., Chap. 14, Art. 36A, to local governmental units in order to assist them in maintaining public peace and order during periods of emergency was, as above noted, held constitutional in State v. Dobbins, supra. That statute authorizes local governments to permit imposition of certain specified and limited prohibitions and restructions during a "state of emergency," which is defined by G.S. 14-288.1(10) as:

> "The condition that exists whenever, during times of public crises, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent."

The statute, G.S., Chap. 14, Art. 36A, is the result of experience of recent years which has made us all to painfully aware that local disturbances may suddenly erupt with tragic consequences into massive public disorders.

The statute wisely provides for placing in local executive officials, whose first and primary duty is to maintain public order, powers adequate to their responsibilities. Thus, the initial decision as to whether a "state of emergency" in fact exists must be made by those who bear primary responsibility and who are closest to the scene. Their decision, however, while entitled to great respect, is not conclusive or entirely free from judicial review. The local official may not act arbitrarily or without some factual basis to support his determination that a state of emergency in fact exists, and the prohibitions and restrictions which he imposes must be among those authorized by the statute, G.S. 14-288.12(b). The scope of judicial review in cases such as this is thus limited to the type of review which traditionally is for the judge, and not for the jury, to perform. In the present case the record amply supports Judge Clark's determination that Chairman Harriss, on the basis of personal knowledge and reliable information, had reasonable grounds to believe and did believe that a state of emergency as defined in the statute existed and that his issuance of the proclamation was not arbitrary or capricious. The extremely limited restrictions imposed by the proclamation, which only prohibited use of the public parks at night and forbade "transportation of dangerous arms or substances," were clearly among those authorized by G.S.

14-288.12(b). Judge Clark committed no error in determining as a matter of law that the proclamation was valid and in so instructing the jury.

We note appellants' contention that the proclamation, though valid on its face, cannot be a proper basis for a criminal charge against them because it was issued and applied in a discriminatory manner. In this connection they contend that it was issued because of and was primarily directed against the activities of ROWP and its members. If this be so, however, there was no evidence that the ordinance was enforced in any discriminatory manner. On the contrary, the evidence showed that others desiring to use the park for such innocent pursuits as playing baseball were similarly denied its use during the prohibited hours. That the activities of ROWP may have been a major factor in bringing on the conditions which prompted declaration of the state of emergency furnishes no valid support for the contention that that organization and its members were unfairly discriminated against. Their activities may have triggered issuance of the proclamation, but once it was issued it was uniformly enforced as to all, at least insofar as the present record discloses.

Nor are we impressed by appellants' contentions that enforcement of the proclamation abridged their First Amendment rights to free speech and to peaceably assemble. No restraint what-

soever was imposed upon speech, and the only restraint imposed on the right of assembly was the prohibition against use of public parks during nighttime hours. Under the circumstances, this very limited restriction was clearly reasonable.

We also find no merit in appellants' several assignments of error to the court's charge to the jury. Where, as here, the uncontradicted evidence, if true, establishes a defendant's guilt as a matter of law, the court may instruct the jury to return a verdict of guilty if it finds such evidence to be true beyond a reasonable doubt. State v. Kimball, 261 N.C. 582, 135 S.E. 2d 568. The peremptory instruction was appropriate in the present case and was in approved form.

In the trial and judgments imposed we find

No error.

Chief Judge BROCK and Judge HEDRICK concur.

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TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1974

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STATE OF NORTH CAROLINA	)	
	)	JUDGMENT DISMISSING APPEAL AND DENYING CERTIORARI
V	)	
	)	
PAUL GILBERT ALLRED, AUBREY L. DAVIS, JR. and IRIS BLUE LEWIS	)	(735SC197)

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This matter came on to be considered upon motion of the Attorney General to dismiss the appeal of the defendants and upon defendants' petition for writ of certiorari; upon consideration whereof, it is adjudged by the court here, that the motion to dismiss the appeal be allowed; that petition for writ of certiorari be denied, and that it be so certified to the said North Carolina Court of Appeals to the intent its decision be affirmed;

And it is considered and adjudged further that the defendant do pay the

sum of TWENTY AND 90/100 ($20.90) and execution issue therefor.

Witness my hand and the seal of the Supreme Court, this 4th day of June, 1974.

/s/ Adrian J. Newton
Clerk of the Supreme
Court of North Carolina

cc: Norman B. Smith, Attorney
Richard F. Kane, Associate Attorney
Burley B. Mitchell, Jr., Solicitor